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IN THE

Supreme Court of the United States

October Term, 1967

NUMBER 721

ROLAND J. DUGAS, *Petitioner*

v.

NIPPON YUSEN KAISHA, *Respondent*

AMICUS CURIAE PETITION AND BRIEF IN FAVOR OF PETITIONER

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STATEMENT OF INTEREST OF THE AMICUS CURIAE

Arthur J. Mandell of Mandell & Wright, Houston, Texas, as a member of the bar of this Court and as Chairman of the Admiralty Section of the American Trial Lawyers Association, on behalf of the American Trial Lawyers Association respectfully petitions this Court for leave to file a brief Amicus Curiae on behalf of Petitioner herein, and if granted, for this Honorable Court to consider the arguments and cases in point following this statement of interest.

This Court has heretofore had before it as amicus curiae the American Trial Lawyers Association. As theretofore stated, it is a national bar association consisting of more than twenty-five thousand lawyers primarily engaged in the practice of personal injury law. The Admiralty Section of this association consists of a substan-

tial number of attorneys who specialize in maritime tort law, particularly as it relates to maritime workers. These maritime workers, engaged as they are in an extremely hazardous industry, have a real and direct interest in the outcome of this appeal.

Said association is vitally concerned in the final outcome of this case involving as it does what has been thought to be two well established principles of law: (a) that the shipowner owes longshoremen an absolute and non-delegable duty to supply them a safe place in which to work, and, (b) that the Safety & Health Regulations for Longshoring promulgated by the Secretary of Labor pursuant to Public Law 85-742, 72 Stat. 835, 33 U.S. C.A. Sec. 941, et seq., in force and effect at the time the injuries to the present Petitioner occurred, establish an accepted standard of safety binding on shipowners as well as stevedores.

The resolution of these two questions are of paramount importance to hundreds of thousands of harbor workers, to the admiralty bar, and to the maritime industry generally. For the foregoing reasons, it is respectfully prayed that this Honorable Court accept this brief of Amicus Curiae and grant leave to the applicant herein to file the same. Petitioner has consented to the appearance of the American Trial Lawyers as Amicus Curiae but Respondent has refused to give its consent.

Arthur J. Mandell

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BRIEF OF AMICUS CURIAE AMERICAN TRIAL LAWYERS ASSOCIATION

STATEMENT

The American Trial Lawyers Association views the questions presented by Petitioner in his Application for Writ of Certiorari as extremely important. The answers will affect thousands of workers engaged in loading and/or discharging vessels throughout the United States, the Admiralty bar and the maritime industry generally. The failure by the Court of Appeals in this case to hold that the violation of the "Safety & Health Regulations for Longshoring" as promulgated by the Secretary of Labor establish generally accepted standards of safety binding on shipowners and stevedores alike, represents a direct threat to the safety of those engaged in this type of work, ignores Congressional concern for the safety of this class of workers and should therefore be dealt with by this Honorable Court.

QUESTIONS PRESENTED

1. DOES A SHIPOWNER HAVE A NON-DELEGABLE DUTY TO PROVIDE LONGSHOREMEN WITH A SAFE PLACE IN WHICH TO WORK AS WELL AS TOOLS AND EQUIPMENT REASONABLY SUITABLE FOR THE TASK AT HAND? Or,

1(a). MAY A SHIPOWNER CONTRACT AWAY ITS ABSOLUTE AND NON-DELEGABLE DUTY TO SUPPLY PROPER TOOLS AND EQUIPMENT TO PERMIT LONGSHOREMEN TO DISCHARGE THEIR DUTIES WITH SAFETY?

2. ARE THE SAFETY AND HEALTH REGULATIONS FOR LONGSHORING (29 C.F.R. Sec. 9.81, et. seq) RELEVANT ON THE ISSUE OF UNSEAWORTHINESS AND NEGLIGENCE IN A SUIT BY A LONGSHOREMAN AGAINST THE SHIPOWNER?

STATEMENT OF THE CASE

For the sake of brevity, we adopt Petitioner's statement of the case.

The decision for which review is here respectfully sought has

(a) departed from, and tends to erode, the established principles of law that the shipowner has an absolute and non-delegable duty to supply longshoremen a safe place in which to work, and,

(b) rejected the applicability of the Safety & Health Regulations of Longshoring promulgated by the

Secretary of Labor pursuant to Public Law 85—742, 72 Stat. 835, 33 U.S.C.A. Sec. 914, et seq, as a standard of conduct which if violated constitutes unseaworthiness, and,

(c) whether "foreseeability" is a prerequisite to a find- of unseaworthiness.

FORESEEABILITY NOT A REQUIRED ELEMENT FOR A FINDING OF UNSEAWORTHINESS

The decision of the Court of Appeals misconceives the import of this Court's decision in *Morales v. City of Galveston,* 370 U.S. 165, 82 S.Ct. 1226 (1962) and injects a new and heretofore unrequired element of foreseeability as a prerequisite to a finding of unseaworthiness, i.e. though conceded that one sling to hold the dunnage was inadequate for the task at hand, the fact that the shipowner may not have had knowledge that only one sling was used relieves him of his non-delegable duty. Respectfully and with great deference to the Court of Appeals, *Morales, Supra,* intended no such holding. This decision if permitted to stand would weaken if not destroy this Court's often reaffirmed doctrine of the absolute non-delegable duty of seaworthiness as a separate and apart concept from negligence. A requirement of foreseeability as an element to prove unseaworthiness would nulify all of this Court's decisions on this doctrine. The Court of Appeals' decision is in sharp conflict with this Court's holding in *Mascuilli v. United States* of May 22, 1967, 87 S.Ct. 1705. *Alaska Steamship Co. v. Petterson,* 347 U.S. 396 (1954). *Mitchell v. Trawler Racer,* 362 U.S. 539 (1960).

But even if the element of "foreseeability" may be given some consideration, the non-delegable duty to supply a

safe place to work encompasses the duty to inspect and to determine the condition under which this group of workers is required to discharge their duties. *New York & New Jersey Sandy Hook Pilots Association v. Halecki*, 251 F.2d 711, aff'd 358 U.S. 613, 79 S.Ct. 517, in which the court stated:

> "'The Deceased was certainly an "invited person" or "business guest" and the shipowner was liable, not only for the negligence of the master, but, although the work was let out to a subcontractor, also for any lack of "reasonable care to ascertain the methods and manner in which *the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let, or the contractor employed, but also during the entire period in which the concessionaire or contractor carried on his activities.*"'" (Emphasis ours).

There is no doubt that Respondent had actual and/or constructive notice that drums or barrels containing *tetra ethyl* lead would be loaded in the hatch and that the dunage was required to be placed over the area where the drums or barrels were to be loaded. Having had actual and/or constructive knowledge that such activity would occur, it was dutybound to provide necessary tools and equipment to permit the performing of such work with reasonable safety to the longshoremen. As Judge McLaughlin said in *Mesle v. Kea Steamship Corp.*, 247 F.2d 747:

> "It is quite apparent that whether or not an appurtenance is 'in fit condition * * * for a voyage and the incident perils of the sea' is usually an irrelevancy. It is said that '(t)he concept of seaworthiness contemplates no more than that a ship's gear shall be reasonably fit for its intended purpose.' Yet

> examination of a great many personal injury cases in which claims of unseaworthiness were presented leads to the conclusion that those cases are of two categories, both of which fit this general definition. One is where the shipowner, having knowledge—actual or constructive—that certain activity will occur, is imposed with an absolute duty of supplying equipment for permitting the conduct and accomplishment in reasonable safety of that activity; liability is imposed for failure to comply with this duty, termed one of making the vessel seaworthy. * * *"

The fact that Respondent contracted with the stevedoring company to do such work does not relieve it of its liability. This Court in *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099 (1946), aff'g. 149 F.2d 98, has stated and has consistently thereafter held that the shipowner while at liberty to contract the work of loading its cargo to others it cannot contract nor delegate its duty to others nor discharge its traditional responsibility. *Crumady v. The JOACHIM HENDRIK FISSER*, 358 U.S. 423, 79 S.Ct. 445 (1959). The Court of Appeals has found and Respondent concedes that Section 9.81 of the Safety & Health Regulations for Longshoring was violated. It found that there should have been a double sling to even up and balance the load and grasp the boards at both ends of the load. The inadequacy of the gear used in loading operations has been held to constitute unseaworthiness even though supplied by the stevedore. *Strika v. Netherland Ministry of Traffic*, 185 F.2d 555 (2nd Cir., 1950), 341 U.S. 904, 71 S.Ct. 614, oftime quoted with approval by this Court. Neither is it a defense that the inadequate equipment or gear used in loading operations simply because it was attached to a shore-based crane.

Huff v. Mattson Navigation Co., 338 F.2d 205 (9th Cir. 1964), cert. den'd 380 U.S. 933; *Spann v. Lauritzen*, 344 F.2d 204 (3rd Cir., 1965); *Duffes v. Federal Barge Lines*, 361 F.2d 422 (1966). Thus, the agency charged by Congress to prepare regulations for the safety of longshoremen, regulations which the Legislative history shows to have been arrived at after the consultation with shipowners and stevedoring companies, has set out the requirement that a double sling should be used. Respondent agrees that had there been a double sling, the dunnage would not have fallen out and Petitioner would not have been injured. These regulations were undoubtedly violated. The Appellate Court erroneously holds that before liability can be imposed on the shipowner, Petitioner must prove that it knew or should have known that the regulations were being violated. It is not questioned that Respondent had constructive knowledge that dunnage was to be lowered into the hatch for the purpose of making the place ready to receive its cargo. It is now hornbook law that knowledge or foreseeability are not required elements to prove unseaworthiness. *Crumady v. The JOACHIM HENDRICK FISSER*, 358 U.S. 423, 79 S.Ct. 445. Indeed, this very Court of Appeals' decision in *Marshall v. Ove Skou Rederi A/S*, 378 F.2d 193 (1967), is inconsistent with its holding in the case at bar.

A VIOLATION OF THE SAFETY & HEALTH REGULATIONS FOR LONGSHORING OF LOADING OPERATIONS, 29 CFR SEC. 9.81 RESULTING IN INJURY TO A LONGSHOREMAN IMPOSES LIABILITY

By enactment of Public Law 85-742, 72 Statute 835, 33 U.S.C.A. 941, et seq., Congress expressed its grave

concern of the human toll taken by the hazardous occupation of longshoring.[1] It therefore directed and empowered the Secretary of Labor to provide for the establishment of an effective safety program in this hazardous occupation.

Prior to the enactment of Title 33, U.S.C.A., Sec. 914, and the promulgation of the regulations thereunder, what constituted negligence or unseaworthiness was to be determined under the definitions laid down by the applicable decisions. The regulations, however, cast no new duty upon the shipowner; neither do they relieve him of any pre-existing duty. With respect to longshoring, the statutory law of the United States, by enactment hereinabove referred to now codifies definite minimum standards. The failure to comply with and meet these standards creating an unsafe place to work constitutes unseaworthiness. Since the duty to supply a safe place to work is a personal one, the duty resting upon the shipowner which he cannot rid himself by contract or otherwise, he is dutybound to inspect the gear used to determine their adequacy and if inadequate, to make them so. These regulations do not impose new duties. Now, as before, the regulations were promulgated, it is incumbent upon shipowners to discharge their non-delegable duty to supply a safe place in which to work. Now, as before, the gear and equipment used in the loading or discharging of cargo, be it through the act of the stevedoring contractor or anyone else, must be fit for the task at hand. If it is not, and injury results,

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1. The House Report accompanying the 1958 Amendment to the Longshoremen's & Harbor Workers' Compensation Act points out that stevedoring is the most hazardous of all industries which report the experience to the Bureau of Labor Statistics, having an injury frequency rate seven times that of manufacturing (1958 U.S. Code and Congressional News, page 3843, Sec. 41 of the Act, 33 U.S.C.A. Sec. 941(a, 1).

the shipowner is liable. This was the law before the promulgation of the rules, and it is the law now. All the regulations do is define how this well-established duty shall be discharged in particular circumstances by the stevedores who have undertaken to perform the shipowner's non-delegable duty. Rule 9.81 establishes a minimum standard of safety—not a new duty. We respectfully submit that a violation of the regulations for loading operations causing injury establishes liability as a matter of law. This Court has repeatedly held that longshoremen are entitled to the traditional and statutory protection as seamen. *Seas Shipping Co. v. Sieracki,* 328 U.S. 85, 66 S.Ct. 872, 90 L.Ed. 1099, aff'g. 149 F.2d 98. Thus, the protective provisions of the Jones Act which incorporates by reference the Federal Employers' Liability Act, Title 45, Sec. 51, U.S.C.A., et seq. apply. The fact that the regulations were violated is undisputed and the Court so holds, 378 F.2d 272. A number of courts have held that the violation of the Safety & Health Regulations for Longshoring causing injury to longshoremen during the course of their employment imposes liability. *Provenza v. American Export Lines, Inc.,* 324 F.2d 660 (4th Cir., 1963). *Boleski v. American Export Lines,* C.C.A. 4th Cir., Oct. 12, 1967. The decision of the Fourth Circuit in Provenza has been cited with approval by many courts, including the Court of Appeals for the Fifth Circuit. *Marshall v. Isthmian Lines, Inc.,* 334 F.2d 133 (1964). Numerous District Courts have reached substantially similar conclusions. In *Andros Shipping Co. v. Panama Canal Company,* 184 F. Supp. 246 (C. Canal Zone, 1960), aff'd. 298 F.2d 720. A violation of navigation rules has been held to establish liability as a matter of law. In *United States v. Grace Lines,* 221 F. Supp. 339 (U.S.D.C. S.D.N.Y., 1963), Grace Lines was found in violation of

the Safety & Health Regulations for Longshoring and a fine was imposed. In *Skipper v. Amerind Shipping Corp.*, 230 F.Supp. 253 (U.S.D.C. E.D. La., 1964), a violation of these regulations causing injury was held to impose liability upon the shipowner. In *Ray v. Compania Naviera Continental, S.A.*, 203 F. Supp. 206, the Court took note of the pamphlet containing Safety & Health Regulations for Longshoring as prepared by the Department of Labor in June of 1960. The Court of Appeals, notwithstanding this Court's decision in *Musculli, supra, Albanese v. N. V. Nederl. Amerik Stoomv. Maats,* 382 U.S. 283, 86 S.Ct. 429 (1965) and the Second Circuit decision in *Skibinski v. Waterman Steamship Corp.*, 360 F.2d 539 (2nd Cir.); *Ferrente v. Swedish American Lines,* 331 F.2d 571 (C.C.A. 3rd Cir.); and *Reed v. Quebec Paper Sales & Transportation Co. v. William Spencer,* 340 F.2d 34 (C.C.A. 2nd Cir.) have nevertheless placed emphasis on the long discarded shipowner lack of control and/or lack of knowledge theory. This Court and most Appellate Courts have rejected the lack of control theory. *Gutierrez v. Waterman Steamship Corp.*, 373 U.S. 206 (1963), 83 S.Ct. 1185; *Petterson v. Alaska Steamship Co., Inc.*, 205 F.2d 478, aff'd 247 U.S. 396, 74 S.Ct. 601.

CONCLUSION

The wide departure by the Appellate Court from the standards laid down by this Court, the great concern expressed by the courts and Congress for the safety of these workers in such hazardous industries, and the danger of erosion of these established principles which the decision presented here for review may engender presents compelling reasons for this Court to settle the law, both on the use of the Safety & Health Regulations for Longshoring as a standard of care and on the doctrine of un-

seaworthiness and negligence in maritime cases, so that the bar, the industry and those working in the industry will have a clear concept of the applicable law.

Respectfully submitted,

AMERICAN TRIAL LAWYERS ASSOCIATION

By: Arthur J. Mandell

Arthur J. Mandell
Chairman, Admiralty Section
American Trial Lawyers Association
Attorney for Amicus Curiae

DATED at Houston, Texas, this the 7th day of November, 1967.

CERTIFICATE OF SERVICE

This is to certify that on the 7th day of November, 1967, copies of the above Amicus Curiae Petition and Brief in Favor of Petitioner was forwarded to:

Mr. Tom Phillips, Taylor, Porter, Brooks, Fuller & Phillips, attorneys at law, Louisiana National Bank Building, Baton Rouge, Louisiana, attorneys for Nippon Yusen Kaisha,

Mr. Jerry H. Bankston, 4359 Plank Road, Baton Rouge, Louisiana, attorney for Roland J. Dugas.

Mr. H. Alva Brumfield, 509 St. Louis Street, Baton Rouge, Louisiana, attorney for Roland J. Dugas.

ARTHUR J. MANDELL